Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

FERNANDO R. ALVAREZ,

Petitioner,

v.

JOHNSON, BLAKELY, POPE, BOKOR, RUPPEL & BURNS, P.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner ALVAREZ hired Respondent law firm to represent him in various legal matters, including the filing of a bankruptcy. Petitioner instructed Respondent to file a Chapter 11 case but Respondent instead filed a Chapter 7 case which resulted in Petitioner sustaining damages. Petitioner sued Respondent for malpractice as a result of Respondent's misfiling, failing to convert the Chapter 7 case to a Chapter 11 case, and for demanding that Petitioner sign a release from malpractice in order to maintain Respondent's continued representation.

The bankruptcy court said the malpractice case belonged to Petitioner. The District Court and the Eleventh Circuit Court of Appeals said it belonged to the bankruptcy estate.

I. Does the furtherance of the overall policy of bankruptcy law as espoused by this Court in *Whiting Pools* intend to grant blanket immunity to bankruptcy counsel from malpractice actions brought by debtor clients?

II. Is a negligent or intentional misfiling by bankruptcy counsel of a bankruptcy case a pre-petition act, a post-petition act, or neither, for purposes of interpreting the meaning of "as of" as set forth in 11 U.S.C. § 541(a)(1)?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner FERNANDO R. ALVAREZ, by and through his counsel, R. Michael DeLoach, Esquire, hereby certifies that the following persons and entities may have an interest in the outcome of this case:

R. Michael DeLoach, Esquire
Attorney for Petitioner

Edward M. Waller, Jr., Esquire
Jeffrey W. Warren, Esquire
Michael C. Markham, Esquire
Attorneys for Respondent

Fernando R. Alvarez
Petitioner

Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A.
Respondent

Alexander L. Paskay
Chief Bankruptcy Judge
Middle District of Florida

Steven D. Merryday
U.S. District Judge
Middle District of Florida

Lauren P. Greene
Bankruptcy Trustee

Brad Hissing, Esquire
Attorney for Bankruptcy Trustee,
Lauren P. Greene
United States Trustee

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PETITION FOR WRIT OF CERTIORARI

Petitioner ALVAREZ respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this proceeding entered on August 30, 2000. This review is requested in order to determine whether bankruptcy policy should be used to prevent a bankruptcy client from ever being able to prosecute a malpractice action, a personal and non-assignable tort under Florida law, against bankruptcy counsel, thereby giving bankruptcy counsel blanket immunity from suit by the client. This, as well as a determination of the meaning of "as of" as set forth in 11 U.S.C. § 541(a)(1), are questions of great public importance and should be answered in order to resolve an apparent conflict of decisions between the Fifth and Eleventh Circuit Courts of Appeal on the issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is published at 224 F.3d 1273 (11th Cir. 2000), and is reprinted in the Appendix hereto ("A-___-___") at pages A-1-15. The opinion of the U.S. District Court for the Middle District of Florida from which the appeal was taken to the Eleventh Circuit is unpublished but is reprinted in the Appendix at pages A-18-20. The opinion of the United States Bankruptcy Court for the Middle District of Florida appealed to the district court is published at 228 B.R. 762 (Bankr. M.D. Fla. 1998) and is reprinted in the Appendix at pages A-21-25.

JURISDICTIONAL STATEMENT

On September 9, 1998, the United States Bankruptcy Court for the Middle District of Florida issued a decision determining that Petitioner ALVAREZ's malpractice claim against Respondent belonged to ALVAREZ and not to the bankruptcy estate. (A-21-25).

Respondent appealed the decision to the United States District Court for the Middle District of Florida, which on August 4, 1999, reversed the bankruptcy court's decision and found that the malpractice claim belonged to the bankruptcy estate. (A-18-20). ALVAREZ timely appealed to the Eleventh Circuit, which on August 30, 2000 affirmed the District Court. (A-1-15). Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of that decision.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Federal jurisdiction in the first instance was determined by the bankruptcy court, over ALVAREZ's objection, to be pursuant to 11 U.S.C. §§ 1334 and 1452.

STATUTES INVOLVED IN THIS CASE

11 U.S.C. § 541:

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under sections 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include –

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that –

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made –

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) should not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farm-out agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable non-bankruptcy law –

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

STATEMENT OF THE CASE

Petitioner ALVAREZ filed a Complaint against Respondent in Florida state court alleging legal malpractice. ALVAREZ alleged that the Respondent negligently disregarded his instructions to file a Chapter 11 reorganizational bankruptcy case and instead filed a liquidating Chapter 7 bankruptcy case. ALVAREZ also alleged as acts of malpractice that after the wrong type of bankruptcy case was filed, Respondent negligently failed to convert the case to a Chapter 11 case after being instructed to do so by ALVAREZ; that Respondent otherwise mishandled his bankruptcy case; and that Respondent demanded that ALVAREZ sign a Release from malpractice in Respondent's favor before Respondent would agree to continue representing him. As damages, ALVAREZ alleged the loss of control and ownership of substantial assets, including ownership interest in stocks and a chose in action, loss of opportunity, loss of use of the assets, and other damages recoverable at law. (A-2).

Respondent removed the state court malpractice action to the United States Bankruptcy Court for the Middle District of Florida. (A-2-3). ALVAREZ and Respondent thereafter filed respective motions requesting the determination of whether or not the malpractice case was property of the bankruptcy estate or property of ALVAREZ. (A-3). The bankruptcy court held that the malpractice claim was not property of the estate. (A-21-25). Respondent appealed to the District Court which reversed the bankruptcy court and held that the malpractice case was property of the bankruptcy estate. (A-18-20). From the District Court Order, ALVAREZ appealed to the United States Circuit Court of Appeals

for the Eleventh Circuit, which on August 30, 2000 issued an opinion (A-1-15) finding that the Trustee in bankruptcy was an indispensable party to the malpractice case and that the malpractice action was indeed part of ALVAREZ's bankruptcy estate. ALVAREZ now requests that this Honorable Court exercise its discretionary jurisdiction and issue a writ of certiorari to review the Eleventh Circuit decision.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. *Rule 10. Supreme Court Rules.* In addition, there may be conflict between decisions of the Fifth and Eleventh Circuit Courts of Appeal of the issues presented herein.

ARGUMENT

I. The furtherance of the overall policy of bankruptcy law as espoused by this Court in *Whiting Pools* should not serve to grant blanket immunity to bankruptcy counsel from malpractice actions brought by debtor clients.

In its opinion, the Eleventh Circuit emphasized the importance of considering the broad scope of § 541(a)(1). (A-9). In fact, it relies upon this Court's decisions in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed. 2d 515 (1983) and *Segal v. Rochelle*, 382 U.S. 375, 86 S.Ct. 511, 15 L.Ed. 2d 428 (1966) in support of its

conclusion. (A-9-13) Although ALVAREZ does not quarrel with this Court's holdings relied upon by the Eleventh Circuit, he does wish to distinguish *Segal* and furthermore questions whether *Whiting Pools* was meant by this Court to prevent bankruptcy clients from ever having the opportunity to sue their lawyers and to immunize negligent bankruptcy lawyers from suit brought by their injured clients. *Segal* is distinguishable in that it involved the determination of pre-petition rights to tax refunds, the payment for which did not accrue until post-petition. The tax issues in *Segal* which predicated the post-petition refund could be determined pre-petition. Conversely, there was no way for ALVAREZ to determine the existence and extent of his malpractice claim until after the incorrect bankruptcy case was filed.

The Eleventh Circuit's decision not to make a decision on the question of whether state law or federal law should be followed when determining whether ALVAREZ's malpractice case was property of his bankruptcy estate or was his own claim to prosecute, seemingly conflicts with the Fifth Circuit's decision in the case of *In re: Swift*, 129 F.3d 792 (5th Cir. 1997). *Swift* clearly holds that the Court must look to state law to determine when a cause of action accrues when determining whether the cause of action is property of the bankruptcy estate or not. The *Swift* decision involved Texas negligence law which is strikingly similar to Florida negligence law. Although this apparent conflict between the Fifth Circuit and Eleventh Circuit may not be clear enough or serious enough for this Court to consider it as a basis for conflict jurisdiction, it does represent an

important federal question that has not been answered in a uniform fashion by the circuit courts of appeal.

Instead of deciding the question, the Eleventh Circuit says that such a determination is unnecessary because in either event the malpractice case is property of ALVAREZ's bankruptcy estate. (A-4-5). In doing so, the Eleventh Circuit relies upon the analyses espoused in *Segal*, supra, and *In re: Tomaiolo*, 205 B.R. 10 (Bankr. D. Mass. 1997). *Tomaiolo*, interestingly, involved a state law considerably different from Florida law for purposes of accrual determination. The Eleventh Circuit determined that because ALVAREZ's legal malpractice cause of action is sufficiently rooted in his pre-bankruptcy past, it should be considered property of ALVAREZ as of the commencement of his bankruptcy case and thus property of his bankruptcy estate. Such a broad policy needs to be restricted by this Court. Otherwise, it could be consistently argued, with the Eleventh Circuit decision as supporting authority, that just about everything that involves a debtor and the debtor's attorney is sufficiently rooted in the client's pre-bankruptcy past. Taken to an absurd but possible extreme, such a holding could mean that once a client hired a bankruptcy lawyer, everything that the bankruptcy lawyer could possibly do to the client after the lawyer's hiring would be rooted in the client's pre-bankruptcy past such that the client would never be able to sue the lawyer for any acts of malfeasance, negligent or intentional, at any time, ad infinitum.

It is extremely important to also recognize when considering these issues, not only Florida state law for purposes of determining when an actionable tort exists, in keeping with the *Swift* decision, but also the well

established Florida legal precedent that a malpractice action is a personal tort which cannot be assigned. *Washington v. Fireman's Fund Insurance Company*, 459 So.2d 1148 (Fla. 4th DCA 1984). See also, *Forgione v. Dennis Pirtle Agency*, 93 F.3d 758 (11th Cir. 1996) and *Forgione v. Dennis Pirtle Agency*, 701 So.2d 557 (Fla. 1997). The transfer of the malpractice claim from the debtor client to the trustee is in essence an assignment by operation of law.

Although the concept of federal preemption is widely recognized and respected, typically the preemption still allows for some type of relief, albeit within a federal forum and pursuant to federal legal precedent. If the Eleventh Circuit's decision is to be followed, there will never be an avenue for redress or relief available to a bankruptcy client against that client's bankruptcy lawyer. ALVAREZ cannot believe that this Court intended for the broad interpretation referenced in the *Whiting Pools* decision to prevent bankruptcy clients from ever having an avenue for relief for otherwise redressable harm caused by their bankruptcy lawyer. ALVAREZ respectfully requests this Court to consider this question and to give its direction on this issue, in that it has far reaching implications and effect upon public policy.

II. The negligent or intentional misfiling by bankruptcy counsel of a bankruptcy case should not be considered a pre-petition act for purposes of interpreting the meaning of "as of" as set forth in 11 U.S.C. § 541(a)(1).

In Judge Hill's concurring *dubitante* opinion, (A-15, 16) he references a question raised by ALVAREZ in his brief below and at oral argument. This issue is whether a

negligent or intentional misfiling of a bankruptcy case is to be considered a pre-petition act, a post-petition act, or neither, for purposes of interpreting the phrase "as of" as set forth in 11 U.S.C. § 541(a)(1). Although Judge Hill believes, contrary to ALVAREZ's position, that ALVAREZ's malpractice claim accrued at the moment his bankruptcy petition was filed, Judge Hill appears troubled that such an act produces two conflicting results. He opines, "When the petition is filed, the estate is instantly created but the alleged tort is also completed. If the filing injures the plaintiff, how can the claim be a part of the estate *as of* the commencement of the case? Or, if the filing injures the Plaintiff, how can the claim not be a part of the estate, and the plaintiff be said to have been injured *after* the commencement of the case, when the last act producing the injury coincides with the estate creation?" This Court should decide this troubling question in that it is a question of federal law that has not been answered, and which has far reaching effect.

ALVAREZ consistently argued below that by looking to Florida state law, he did not have a completed cause of action that could be enforced against Respondent in a Florida court until after the bankruptcy petition was filed. In other words, the tort was not complete for accrual purposes until all elements of the tort were completed. There were no damages to ALVAREZ until the act of filing was completed, which was post-petition. Therefore, by accepting ALVAREZ's argument that the cause of action for state law purposes did not accrue until after the petition was filed, this Court could answer Judge Hill's query by holding that a negligent or intentional misfiling, although actually contemporaneous with the

commencement of the bankruptcy case, affects post-petition matters such that it should not be considered property in existence "as of" the commencement of the bankruptcy case for purposes of determining whether or not the action is property of the estate as contemplated by § 541(a)(1). Using Judge Hill's analogy, this Court would be pushing over the coin which "stands on its edge" and thereby ensuring that any coins flipped in the future would not land in such a position.

This Honorable Court should undertake to resolve the questions set forth in this petition because they affect the American populace, in that all Americans are potential debtors in bankruptcy which will more likely than not engage the services of a bankruptcy attorney in furtherance of seeking the relief afforded to them in the federal bankruptcy laws. The problem faced by ALVAREZ that has been raised herein and below is one that could continue to occur without resolution and with no uniformity of result, without the decision of this Court, which opportunity is presented by this case and by this Petition.

CONCLUSION

Although bankruptcy policy encourages a broad interpretation of § 541(a)(1), it should not be implemented to deny all bankruptcy clients of the ability to bring personal, non-assignable malpractice actions against their lawyers. To do so would be to grant blanket immunity to bankruptcy lawyers from suits brought by

their clients, and the potential for abuse would be great with no avenue for redress available to the injured client.

The act of misfiling, which is an act contemporaneous with the commencement of the bankruptcy case, should be considered post-petition for purposes of determining whether any claim arising out of the misfiling is property of the estate. To do otherwise would be to permanently deprive a bankruptcy client of the right to sue counsel and thereby deny the client access to courts.

Petitioner ALVAREZ respectfully requests that this Court grant the requested relief, issue the writ and decide the important questions raised herein.

Respectfully submitted,

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APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-12918

D. C. Docket No. 98-02261-CIV-T-23B

IN RE: FERNANDO R. ALVAREZ,

Debtor.

JOHNSON, BLAKELY, POPE, BOKOR,
RUPPEL & BURNS, P.A.,

Plaintiff-Appellee,

versus

FERNANDO R. ALVAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 30, 2000)

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

ANDERSON, Chief Judge:

Fernando Alvarez appeals from the district court's order reversing an order of the bankruptcy court. His

appeal raises the question of whether his legal malpractice cause of action, relating to the filing of his petition for bankruptcy, is property belonging to him as an individual or is property of his bankruptcy estate. We conclude that the malpractice claim is property of Alvarez's bankruptcy estate, and accordingly, we affirm the order of the district court.

I. FACTUAL & PROCEDURAL BACKGROUND

Fernando Alvarez filed a complaint against the law firm of Johnson, Blakely, Pope, Bokor, Ruppel & Burns ("Johnson Blakely") in Florida state court, alleging legal malpractice. The crux of Alvarez's malpractice claim is his allegation that Johnson Blakely negligently disregarded his instructions to file a reorganizational bankruptcy case (Chapter 11) on his behalf and instead filed a liquidating bankruptcy case (Chapter 7). Alvarez's complaint alleged that as a result of Johnson Blakely's negligent actions, Alvarez "sustained damages including, but not limited to, the loss of control and ownership of substantial assets, including ownership interests in stocks and a chose in action, loss of opportunity, loss of use of the assets, and other damages recoverable at law."

Johnson Blakely removed the malpractice action to the United States Bankruptcy Court for the Middle District of Florida.[1] Johnson Blakely subsequently filed a

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[1] Alvarez then filed a "Motion for Remand or, in the Alternative, Motion for Mandatory Abstention or, in the Alternative, Motion for Permissive Abstention, and Objection to Designation as Core Proceeding." The bankruptcy court denied

motion for judgment on the pleadings contending that the claims asserted in Alvarez's complaint are property of Alvarez's bankruptcy estate, not property of Alvarez the debtor, and that, accordingly, those claims can only be asserted by the bankruptcy trustee or, at least, the trustee is an indispensable party to the litigation. Thus, Johnson Blakely argued that unless the trustee is joined, the complaint should be dismissed.

The bankruptcy court held that the claims in Alvarez's complaint are not property of the estate and that, as a result, the trustee is not an indispensable party to the litigation. The bankruptcy court denied Johnson Blakely's motion for judgment on the pleadings, and Johnson Blakely appealed to the district court. The district court reversed, holding that the malpractice action is property of Alvarez's bankruptcy estate and that the bankruptcy trustee is indispensable to maintenance of the action. The district court remanded the case to the bankruptcy court for further proceedings consistent with its order. From the district court's order, Alvarez now appeals to this Court.[2]

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that motion. Alvarez appealed that denial to the United States District Court for the Middle District of Florida. The district court dismissed the appeal, and Alvarez appealed to this Court. We dismissed the appeal for lack of jurisdiction.

[2] The order appealed from is a final and appealable order. *See T&B Scottdale Contractors, Inc. v. United States*, 866 F.2d 1372, 1375 (11th Cir. 1989) (holding that a district court's decision to include funds in a bankrupt's estate is final and appealable and clarifying that, while an order is not final if on remand the bankruptcy court must exercise "significant judicial activity involving considerable discretion," such activity must be related to the order entered by the district court). We thus have jurisdiction to hear this appeal.

II. DISCUSSION

The issue we must decide is whether or not Alvarez's legal malpractice cause of action is property of his bankruptcy estate. Section 541(a)(1) of the Bankruptcy Code defines "property of the estate" to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).[3] The question, then, is whether this malpractice claim constituted a "legal or equitable [interest] of [Alvarez] in property" "as of" the commencement[4] of his bankruptcy case, such that the malpractice claim became property of his estate. We note that the parties disagree about whether this question is governed by state law[5] or federal bankruptcy law.[6] We decline to decide the question of which

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[3] Section 541(b) lists exclusions from this broad definition of "property of the estate," none of which are asserted to be applicable here.

[4] The filing of a petition for bankruptcy marks the commencement of the bankruptcy case. *See* 11 U.S.C. § 301.

[5] *See, e.g., Southtrust Bank of Alabama v. Thomas (In re Thomas)*, 883 F.2d 991, 995 (11th Cir. 1989) (stating that whether an interest of the debtor is property of the estate is a federal question, but the nature and existence of the debtor's right to property is determined by looking at state law); *Charles R. Hall Motors, Inc. v. Lewis (In re Lewis)*, 137 F.3d 1280, 1283 (11th Cir. 1998) (same); *State Farm Life Ins. Co. v. Swift (In re Swift)*, 129 F.3d 792, 795 (5th Cir. 1997) (looking to state law to determine if debtor had a property interest in a cause of action at the time he filed bankruptcy).

[6] *See, e.g., Segal v. Rochelle*, 382 U.S. 375, 379, 86 S.Ct. 511, 515 (1966) (concluding that a debtor's claim for loss-carryback tax refunds was property of the bankruptcy estate, and, in reaching that conclusion, stating: "Whether an item is classed as 'property' by the Fifth Amendment's Just-Compensation Clause

law governs this determination, because in either event, we conclude that this legal malpractice claim is property of Alvarez's bankruptcy estate.

A. Florida Law

Under Florida law, a cause of action for legal malpractice has three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence was the proximate cause of loss to the client. *See Steele v. Kehoe*, 747 So.2d 931, 933 (Fla. 1999). The third element of a legal malpractice claim, that the attorney's negligence be the proximate cause of loss to the client, is also referred to as the concept of "redressable harm." *Lenahan v. Russell L. Forkey, P.A.*, 702 So.2d 610, 611 (Fla. 4th DCA 1997). Pursuant to Fla. Stat. Ann. § 95.031(1), a cause of action accrues "when the last element constituting the cause of action occurs."[7]

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or for purposes of a state taxing statute cannot decide hard cases under the Bankruptcy Act, whose own purposes must ultimately govern"); *In re Tomaiolo*, 205 B.R. 10, 14 (Bankr. D. Mass. 1997) (relying on *Segal* to conclude that bankruptcy policy considerations, not state law, drive the determination of whether or not a debtor's chose in action is to be included in the bankruptcy estate); *In re Richards*, 249 B.R. 859 (Bankr. E.D. Mich. 2000) (relying on *Segal* to conclude that the appropriate inquiry for determining whether the debtor's cause of action is property of the estate is whether the claim is sufficiently rooted in the pre-bankruptcy past, not the date that the claim accrues under state law).

[7] We recognize that, under Florida law, the statute of limitations does not begin to run with respect to an action for professional malpractice until "the cause of action is discovered or should have been discovered with the exercise of due

Alvarez argues that the third element of his malpractice cause of action, that of redressable harm, did not occur

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diligence." Fla. Stat. Ann. § 95.11(4). This fact is irrelevant for our inquiry, however. As the Fifth Circuit stated in *State Farm Life Ins. Co. v. Swift (In re Swift)*, 129 F.3d 792, 798 (5th Cir. 1997):

> We are determining when the [cause] of action accrued for purposes of ownership in a bankruptcy proceeding. The time of discovery of the injury is not relevant to this inquiry. A cause of action can accrue for ownership purposes before the statute of limitations for that cause of action has begun to run.

Along these lines, we note that a study of relevant Florida caselaw may create some confusion about use and meaning of the word "accrual." As explained above, under Fla. Stat. Ann. § 95.031(1), "[a] cause of action accrues when the last element constituting the cause of action occurs." Some Florida cases, however, suggest that the concept of accrual in the legal malpractice context includes the discovery aspect of the statute of limitations inquiry. *See, e.g., Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323, 1325 (Fla. 1990) ("Generally, a cause of action for negligence does not accrue until the existence of a redressable harm or injury has been established and the injured party knows or should know of either the injury or the negligent act."); *cf. Swift*, 129 F.3d at 796-98 (noting that recent Texas cases "have muddied the waters" and blended the issue of accrual and the start of the statute of limitations "because of the luxury of the discovery rule in a statute of limitations case" and because "the issue of accrual of a cause of action rarely occurs apart from the issue of when the statute of limitations begins to run"). As noted, however, a cause of action can accrue for ownership purposes in a bankruptcy proceeding before the statute of limitations begins to run. Thus, our inquiry is concerned with when Alvarez's legal malpractice "accrued" in the sense of Fla. Stat. Ann. § 95.031(1), *i.e.* when the last element constituting his cause of action occurred.

until after the filing of his bankruptcy petition.[8] We disagree.

At the moment Alvarez's bankruptcy petition was filed, his Chapter 7 bankruptcy estate was created, *see* § 541(a) ("The commencement of a case under section 301 . . . of this title creates an estate."), his interests in property vested in the estate, and all of the legal ramifications attendant to creation of such an estate came into existence.[9] The transfer of Alvarez's interests in property

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[8] It is clear that the first two elements of the cause of action occurred as of the filing. Johnson Blakely was employed by Alvarez prior to filing, and the alleged negligent acts involving the preparation and decision to file a Chapter 7 petition rather than a Chapter 11 petition occurred prior to filing as well. The alleged negligent act of filing the Chapter 7 petition occurred as of the time of the filing.

[9] The legal consequences of filing a Chapter 7 petition, and thus creating a Chapter 7 estate, are quite different than those attendant to a Chapter 11 petition. For instance, in a Chapter 7 case, a trustee is appointed who is charged with the duty of liquidating the assets in the debtor's bankruptcy estate with the goal of satisfying as many of the creditors' claims as possible. *See, e.g., Cable v. Ivy Tech State College*, 200 F.3d 467, 472 (7th Cir. 1999) ("Chapter 7 establishes a . . . radical solution to indebtedness, requiring the liquidation of the debtor's property, to which end Congress granted the trustee broad powers without interference from the debtor. The trustee has sole authority to dispose of property. . . . "). In a Chapter 11 case, the debtor-in-possession generally manages and administers his own bankruptcy estate, with the goal of reorganizing his affairs rather than liquidating them. *See, e.g., Canadian Pacific Forest Products, Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1442 (6th Cir. 1995) ("The purpose of [Chapter 11] is to provide a debtor with legal protection in order to give [him] the opportunity to reorganize, and thereby to provide creditors with going-concern value rather than the possibility of a more

to a Chapter 7 bankruptcy estate rather than a Chapter 11 bankruptcy estate as Alvarez intended is sufficient injury to indicate that Alvarez had a cognizable interest in this legal malpractice claim at the precise moment his Chapter 7 petition was filed. Alvarez suggests, without pointing to any relevant authority, that the harm to him did not occur until some later time, for example when the trustee in bankruptcy failed to realize from one of the assets as much as Alvarez alleges should have been realized. We disagree. Alvarez's loss of ownership and control of his assets upon the bankruptcy filing constitutes a significant and tangible change which obviously caused harm to him. No one would suggest that the victim of a conversion is not harmed when deprived of ownership and control of an asset.[10] While we have found no Florida cases directly on point,[11] we readily conclude that

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meager satisfaction through liquidation."). Indeed, Alvarez alleges that his damages were caused because a Chapter 7, rather than a Chapter 11, petition was filed.

[10] We note that Alvarez's further allegation of Johnson Blakely's post-filing failure to convert the case from Chapter 7 to Chapter 11 is more aptly described as simply a failure to seek to remedy the initial negligent act or ameliorate the harm, rather than as an independent act of negligence.

[11] Nor has either party cited helpful authority. Unlike the instant case, none of the cases relied upon by Alvarez or the Bankruptcy Court involved allegations of pre-petition malpractice resulting in damage to the plaintiff from the loss of control of assets, which of course occurred here as of the filing of the petition. Although the facts in *Collins v. Federal Land Bank of Omaha*, 421 N.W.2d 136 (Iowa 1988) would appear to be similar to the instant facts, a majority of the Supreme Court of Iowa concluded, without any explanation, that it failed "to discern how any adverse economic consequences produced by

redressable harm occurred at the moment of bankruptcy filing.

To the extent that Alvarez suggests that redressable harm occurring at the instant of filing is insufficient to make this cause of action part of his bankruptcy estate because the estate includes only interests the debtor holds immediately *prior* to filing,[12] and not those interests arising simultaneously with filing, we again disagree. The plain language of § 541(a)(1) includes in the estate interests of the debtor "as of" filing, not interests of the debtor "before" or "prior to" filing. *See Jones v. Hyatt Legal Services (In re Dow)*, 132 B.R. 853, 860 (Bankr.S.D.Ohio 1991) (noting that the language "as of" is significant and holding that where damages caused by alleged malpractice occurred at the point of filing of the petition, the cause of action was property of the estate). Moreover, Congress

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the chapter 7 election [rather than a Chapter 11] could have impacted on the Collinses until after the chapter 7 petition was filed." *Id.* at 139. The Iowa court apparently overlooked the loss of control of a debtor's assets which occurs as of a Chapter 7 filing. To the extent that the Iowa court suggested that such loss of control does not constitute redressable harm, we respectfully disagree. Under Florida law, a cause of action accrues at the time injury from a negligent act is first inflicted, and not at the time that the full extent of the damages is ascertained. *See Carter v. Cross*, 373 So.2d 81, 82-3 (Fla. 3d DCA 1979).

[12] It is well-settled that causes of action which have accrued prior to bankruptcy become part of the bankruptcy estate. *See Venn v. St. Paul Fire and Marine Ins. Co.*, 99 F.3d 1058, 1064 n.10 (11th Cir. 1996); *see also Miller v. Shallowford Community Hosp., Inc.*, 767 F.2d 1556, 1559 (11th Cir. 1985) ("The legislative history [of 11 U.S.C. § 541(a)(1)] indicates that [the] definition [of property of the estate] includes causes of action existing at the time of the commencement of the bankruptcy action.").

intended the scope of § 541(a)(1) to be broad. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05, 103 S.Ct. 2309, 2313 (1983); S.Rep. No. 95-989, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868; H.R.Rep. No. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323. We thus conclude that, looking to state law, this interest in property arising simultaneously with the filing of Alvarez's bankruptcy petition was an interest of Alvarez in property "as of" the commencement of the case, and thus, property of the estate under § 541.

B. Federal Bankruptcy Law

We reach the same conclusion by applying federal bankruptcy law. In *Segal v. Rochelle*, 382 U.S. 375, 86 S.Ct. 511 (1966), the Supreme Court considered the question, under the former Bankruptcy Act,[13] of whether or not the debtors' claims for loss-carryback tax refunds were property of the debtors' bankruptcy estates or property of the individual debtors. Under the tax laws, the loss-carryback refund claims could be asserted only when the tax year had closed, which was post-petition; thus, the tax

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[13] The Bankruptcy Act of 1898 was repealed in 1978 and replaced by the current Bankruptcy Code. *See Georgian Villa, Inc. v. United States (In re Georgian Villa, Inc.)*, 55 F.3d 1561, 1562 n.2 (11th Cir. 1995). While *Segal* was decided under the 1898 Act, nothing in the changed language suggests a change in the relevant *Segal* holding. Moreover, the legislative history expressly indicates that the current Code follows *Segal*'s result. *See* S.Rep. No. 95-989, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868; H.R.Rep. No. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; *In re Yonikus*, 996 F.2d 866, 869 n.3 (7th Cir. 1993).

refunds in *Segal* were sought and received after the filing of the bankruptcy. In reaching the conclusion that these potential claims for refunds were property of the bankrupts at the time their bankruptcy petitions were filed, the Court did not look to state law. Instead, the Court noted:

> Whether an item is classed as "property" by the Fifth Amendment's Just-Compensation Clause or for purposes of a state taxing statute cannot decide hard cases under the Bankruptcy Act, whose own purposes must ultimately govern.
>
> The main thrust of § 70a(5) is to secure for creditors everything of value the bankrupt may possess . . . when he files his petition. To this end the term "property" has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.

382 U.S. at 379, 86 S.Ct. at 515. The Court determined that two key elements pointing toward realization of a tax refund existed at the time the bankruptcy petitions were filed: 1) taxes had been paid on net income in prior years, and 2) the year of bankruptcy, at that point, exhibited a net operating loss. *See id.* at 380, 86 S.Ct. at 515. The Court concluded that the loss-carryback refund claims were "sufficiently rooted in the pre-bankruptcy past . . . that [they] should be regarded as 'property' " under the Bankruptcy Act. *Id.*[14]

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[14] In reaching its conclusion that these refund claims were property under the Act at the time of filing, the Court also determined that the claims were "little entangled with the bankrupts' ability to make an unencumbered fresh start." 382

Applying the rationale of *Segal* to the instant case, we conclude that Alvarez's legal malpractice cause of action is also sufficiently rooted in his pre-bankruptcy past that it should be considered property of Alvarez as of the commencement of his bankruptcy case, and thus property of his estate. Alvarez established an attorney-client relationship with Johnson Blakely prior to his filing for bankruptcy, and this cause of action arises directly out of Alvarez's interactions with the firm prior to filing – *i.e.* Alvarez's instructions to Johnson Blakely to file Chapter 11 and the firm's alleged disregard of those instructions – *i.e.* the preparation and filing instead of a Chapter 7 petition. Simultaneous with the filing, Alvarez suffered significant harm from the firm's alleged negligence, *i.e.*

U.S. at 379, 86 S.Ct. at 515. The Code, however, eliminates this inquiry from the determination of whether an interest of the debtor is property of the estate. *See* S.Rep. No. 95-989, at 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868; H.R.Rep. No. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6324 ("Paragraph (1) [of subsection (a) of § 541] has the effect of overruling *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903), because it includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. 522. . . . ") (footnote omitted); *see also Rau v. Ryerson (In re Ryerson)*, 739 F.2d 1423, 1426 (9th Cir. 1984).

After concluding that the refund claims were property of the bankrupts as of filing, the *Segal* Court then proceeded to make the additional determination, required under the former Act but not the current Code, that the loss-carryback refund claims were property "which prior to the filing of the petition [the bankrupt] could by any means have transferred . . . ," in order to reach its ultimate determination that the refunds claims were property of the bankrupts' estates. 382 U.S. at 381-85, 86 S.Ct. at 516-18.

the loss of control of assets. The claim in the instant case is even more firmly "rooted in the pre-bankruptcy past" than the claim in *Segal*. *See also Tomaiolo*, 205 B.R. at 15 (concluding that debtor's legal malpractice claims, including claim concerning services in the preparation of documents filed with the bankruptcy petition, were sufficiently rooted in the pre-bankruptcy past to be includible in bankruptcy estate).

III. CONCLUSION

The bankruptcy trustee is the legal representative of the bankruptcy estate, with capacity to sue and be sued. *See* 11 U.S.C. § 323. Thus, as we have concluded that the legal malpractice cause of action at issue is property of Alvarez's bankruptcy estate, and as there is no indication in the record before us that the trustee has abandoned this claim, Alvarez may not maintain this suit without participation by the trustee. *See Vreugdenhil v. Hoekstra*, 773 F.2d 213, 215-16 (8th Cir. 1985) (noting that authorities agree, although on varying rationales, that a debtor may not prosecute on his own a cause of action belonging to the estate unless that cause of action has been abandoned by the trustee).[15]

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[15] Alvarez also argues that there is no federal jurisdiction over this malpractice cause of action. 28 U.S.C. § 1334(b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." This provision creates jurisdiction in three categories of proceedings: those that "arise under title 11," those that "arise in cases under title 11," and those "related to cases under title 11." *Continental Nat'l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1344

Alvarez also argues that the bankruptcy court erred in denying his motion to remand or abstain. Assuming *arguendo*, but not deciding, that we might appropriately exercise appellate jurisdiction over that issue, we decline to exercise it. We have held that the malpractice cause of action is property of the estate. The trustee in bankruptcy, not Alvarez, is the appropriate person to urge remand or abstention, matters which can be addressed by the bankruptcy court on remand.

The judgment of the district court is

AFFIRMED.

HILL, Circuit Judge, concurring *dubitante*:

I concur with the majority. I confess some doubt, however, as to the enthusiasm with which they reach their result. The term "property of the estate" is comprised of "all legal or equitable interests of the debtor in

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(11th Cir. 1999). The bankruptcy court's jurisdiction is derivative of and dependent upon these three bases. *See id.* As the malpractice claim belongs to Alvarez's bankruptcy estate, the bankruptcy court clearly has "related to" jurisdiction over it, as the value of the claim, if it has any, will inure to the benefit of the estate. *Cf. Toledo*, 170 F.3d at 1345-47 (holding that there was "related to" jurisdiction over adversary proceeding where the value and extent of the estate's indirect interest in partnership property would necessarily be affected by the outcome of the adversary proceeding and where the outcome could have the conceivable effect of partially satisfying one secured creditor's claim, thus freeing up additional money for distribution to unsecured creditors).

property *as of* the commencement of the case." 11 U.S.C. § 541 (emphasis added). Therefore it seems to me that whether a claim is "property of the estate" depends upon whether the claim accrued *before or after* the filing of the petition. In Florida, the accrual of a negligence action is measured *from the time the injuries are sustained* and not from the time the full extent of the damages have been ascertained. *Trizec Properties, Inc. v. Biltmore Constr. Co., Inc.*, 767 F.2d 810, 812 n.4 (11th Cir. 1985) (emphasis added).

Here I believe the claim accrued at the moment the petition was filed. What we then have is a single act which produces two conflicting results. When the petition is filed, the estate is instantly created but the alleged tort is also completed. If the filing injures the plaintiff, how can the claim be a part of the estate *as of* the commencement of the case? Or, if the filing injures the plaintiff, how can the claim not be a part of the estate, and the plaintiff be said to have been injured *after* the commencement of the case, when the last act producing the injury coincides with the estate creation?[1]

With these doubts expressed, and a belief, as the majority opines, that the term "property of the estate" should be generously construed, I concur, because I believe the general purposes of the bankruptcy code are better served by the panel majority's unraveling of this conundrum.

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[1] Decision-makers have been accused of flipping coins – "Heads, it is property of the estate, tails, it is not." That doesn't decide the issue when the coin stands on its edge.

United States Court of Appeals

For the Eleventh Circuit

No. 99-12918

District Court Docket No. 98-02261-CIV

IN RE: FERNANDO R. ALVAREZ,

Debtor.

JOHNSON, BLAKELY, POPE,
BOKOR, RUPPEL & BURNS, P.A.,

Plaintiff-Appellee,

versus

FERNANDO R. ALVAREZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

JUDGMENT

(Filed Aug. 30, 2000)

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed in accordance with Fed.R.App.P. 39.

HILL, Circuit Judge, concurred dubitante and filed an opinion.

Entered: August 30, 2000
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: OCT 04 2000

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE
FERNANDO R. ALVAREZ
_____/

JOHNSON, BLAKELY, POPE,
BOKOR, RUPPEL and
BURNS, P.A.,

Appellant,

v.

FERNANDO R. ALVAREZ,

Appellee.
_____/

Case No.
98-2261-CIV-T-23B

ORDER

(Filed Aug. 4, 1999)

The law firm of Johnson, Blakely, Pope, Bokor, Rupple and Burns, P.A., (Johnson Blakely) appeals from an order of the bankruptcy court holding (1) that a claim for legal malpractice, which allegedly arises upon the act of negligently initiating in Chapter 7, rather than in Chapter 11, the same bankruptcy action in which the challenged order was entered, is not an interest in property of the debtor "as of" the petition in bankruptcy within the meaning of Section 541 of Title 11 of the United States Code and (2) that, therefore, the chose in action is not the property of the trustee in bankruptcy but, rather, is property of the debtor apart from the debtor's estate. Further, the challenged order determines derivatively that the

trustee is not an indispensable party to the debtor's malpractice action against Johnson Blakely.

After consideration of the arguments and authorities presented by Johnson Blakely and the debtor, Alvarez, I conclude that, given the facts of this case, the better rule is that a chose in action, especially one with ascertainable and tangible roots in pre-petition activity, which arises at the instant of the allegedly negligent institution of a bankruptcy proceeding, is an interest in property obtaining to the debtor "as of" the moment of filing of the petition. Consequently, the chose in action is, at its inception and perforce Section 541, the property of the trustee, who immediately becomes indispensable to the maintenance of that malpractice action. This result is commended by the preeminence of governing federal bankruptcy principles over more narrowly targeted state pleading and limitations principles, the centrality of federal bankruptcy policy with respect to the marshaling and distribution of a debtor's estate, and the objective of discouraging artificially circumscribed, delayed, or otherwise remodeled claims by debtors arising from transactions proximately and logically related to a bankruptcy.

Accordingly, the order of the bankruptcy court is **REVERSED** in both respects and **REMANDED** for further proceedings consistent with this order.[1] The Clerk is directed to close this file and terminate all pending motions.

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[1] After examination of the briefs and the record, the Court finds that oral argument is not needed. *See* Fed.R.Bankr.Pro. 8012.

ORDERED in Tampa, Florida, on August 4th, 1999.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT
JUDGE

UNITED STATES BANKRUPTCY COURT
IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

FERNANDO R. ALVAREZ,

Debtor.

Case No. 91-15749-8P7

_____/

FERNANDO R. ALVAREZ,

Plaintiff,

vs.

Adv. No. 96-780

JOHNSON, BLAKELY, POPE, BOKOR, RUPPEL AND BURNS, P.A., a Florida Corporation,

Defendant.

_____

ORDER ON MOTION FOR REHEARING AND RECONSIDERATION OF JULY 2, 1998 ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND PLAINTIFF'S MOTION FOR DETERMINATION OF OWNERSHIP OF CHOSE IN ACTION IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT (DOC. #29)

(Filed Sep. 09, 1998)

THIS CAUSE came on for hearing upon Defendant, Johnson, Blakely, Pope, Bokor, Ruppel and Burns, P.A.'s (Johnson, Blakely) Motion for Rehearing and Reconsideration of July 2, 1998 Order on Defendant's Motion for Judgment on the Pleadings and Plaintiff's Motion for Determination of Ownership of Chose in Action. The Court, in its Order, held that the claims of the Debtor,

originally asserted in the State Court action which was removed to this Court, are not properties of the Chapter 7 estate. The Court reviewed the Motion and the record and heard argument of counsel and based on the undisputed facts as they appear from the record which are relevant to the Motion under consideration finds as follows:

On December 6, 1991, Fernando R. Alvarez (Debtor), represented by Johnson, Blakely, filed his Petition for Relief under Chapter 7 of the Bankruptcy Code. During the pendency of his Chapter 7 case, the Chapter 7 Trustee made a decision to sell rather than pursue certain causes of action against the Defendants, and sold the cause of action to the highest bidder with this Court's approval. The Debtor claimed that pursuing the cause of action would have resulted in a favorable judgment in an amount much larger than the proceeds of the sale of the cause of action and, in turn, would have produced a surplus after satisfying all allowed claims.

The Debtor contends that the decision to file Chapter 7, which enabled the estate assets to be in the hands of the Chapter 7 Trustee who in turn sold the cause of action, resulted in damages, i.e. the Debtor's loss of potential surplus funds. As a result, the instant adversary proceeding was commenced on July 2, 1996, when the Debtor filed a Complaint against Johnson, Blakely in the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, Case No. 96-4420, alleging in part that Johnson, Blakely committed legal malpractice by filing the Debtor's bankruptcy case under Chapter 7 rather than Chapter 11 and that the decision to file Chapter 7 caused him damages. The adversary proceeding was

removed to this Court on August 1, 1996. In due course, Johnson, Blakely filed its Answer, Defenses, and Counterclaim.

On May 8, 1998, Johnson, Blakely filed a Motion for Judgment on the Pleadings, contending that the Debtor's claim is property of the estate and not property of the Debtor and/or that pursuant to Fed.R.Bankr.Pro. 7019 the Chapter 7 Trustee is an indispensable party who the Debtor failed to join. In turn, the Debtor filed a Motion for Determination of Ownership of Chose in Action, seeking a determination by this Court of what part, if any, of the Debtor's claims are property of the estate and whether the Chapter 7 Trustee has standing to participate in this action as a proper or indispensable party.

On July 2, 1999, this Court entered an Order and held that under Florida law, the accrual of a negligence action is measured from the time the injuries are sustained and not from the time the full extent of the damages sustained have been ascertained. With respect to each of the claims that (1) Johnson, Blakely negligently filed the Petition under Chapter 7; (2) Johnson, Blakely negligently failed to seek the timely conversion of the case to a case under Chapter 11; (3) Johnson, Blakely failed to administer the bankruptcy case; and (4) Johnson, Blakely demanded the Debtor to sign a waiver and release in exchange for continued representation, this Court found that the damages sustained, if any, occurred post-petition. Therefore, this Court held that causes of action accrued post-petition and are not property of the estate.

Johnson, Blakely now seeks the reconsideration of the July 2, 1998 Order based not on newly discovered

evidence, but on the contention that this Court committed an egregious legal error which this Court should correct and should not compel the Johnson Blakely to seek redress through the appeal process.

The ultimate question is whether any of the Debtor's four claims against Johnson, Blakely are property of the estate. Clearly, with respect to the Debtor's claim that Johnson, Blakely negligently failed to seek the timely conversion of the case to a case under Chapter 11, all elements of the Debtor's claim occurred after the commencement of the Chapter 7 case. Equally, all elements of the Debtor's claim that Johnson, Blakely failed to administer the bankruptcy case occurred post-petition for the simple reason that pre-petition there was no bankruptcy estate to administer. The Debtor's claim that Johnson, Blakely demanded that the Debtor sign a waiver and release in exchange for continued representation is alleged to have taken place post-petition and, therefore, the Debtor's claim regarding this occurrence accrued post-petition.

The only claim which questionably could have accrued pre-petition is the Debtor's claim that Johnson, Blakely failed to select the proper chapter for relief under the Bankruptcy Code. The mere filing of the Chapter 7 case, however, did not trigger or inflict any damages at the time of the commencement of the case. Rather, the triggering event which resulted in damages is the Chapter 7 trustee's sale rather than prosecution of the Debtor's claims. No damages were sustained prior to the commencement of the case and, therefore, the Debtor's causes of action accrued post-petition. *Trizec Properties, Inc. v. Biltmore Construction Co., Inc.*, 767 F. 2d 810 (11th Cir.

1985). This Court, having reconsidered the July 2, 1998 Order, finds that the Order should be affirmed.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that upon reconsideration, this Court's Order on Defendant's Motion for Judgment on the Pleadings and Plaintiff's Motion for Determination of Ownership of Chose in Action entered on July 2, 1998 be, and the same is hereby affirmed.

DONE AND ORDERED at Tampa, Florida, on SEP 09 1998.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
Chief Bankruptcy Judge

C: R. Michael DeLoach, 311 East Robertson Street, Brandon, FL 33511. Attorney for Plaintiff
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